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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ALONZO HARRIS et al., Defendants and Appellants.	B257675 (Los Angeles County Super. Ct. No. BA343411)

APPEAL from judgments of the Superior Court of Los Angeles County, Stephen Marcus, Judge. Harris's judgment is affirmed. Nelson's judgment is to be modified in accordance with this opinion, and the matter remanded to the trial court for resentencing.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant Alonzo Harris.

Law Offices of Allen G. Weinberg and Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant Floyd Nelson.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, Margaret E. Maxwell and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants, Alonzo Harris and Floyd Nelson, appeal their convictions for charges arising out of a series of robberies, attempted robberies and associated crimes. The prosecution's theory was that defendant Harris committed robberies from October to December 2007 with Glenn Boldware until Boldware was shot and killed by Los Angeles police officers on January 4, 2008. Thereafter, Harris carried out a few robberies by himself (and once with an unidentified accomplice), before being joined by defendant Nelson for the last robbery attempt on July 11, 2008, a crime which immediately led to their arrest.

Harris and Nelson raise evidentiary and sentencing issues. For the reasons discussed below, Harris's judgment is affirmed. Nelson's judgment is affirmed as modified, and the matter is remanded to the trial court for resentencing.

BACKGROUND

Viewed in accordance with the usual rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *The crimes.*

a. *Anawalt Lumber Company [counts 30–36].*

On October 7, 2007, at approximately 8:20 p.m., Gillian Harden, Christopher Rumohr, Darron Lewis and Donald Duffy were working as inventory contractors at Anawalt Lumber Company at 1001 Highland Avenue in Hollywood. In addition to the four contractors, two Anawalt employees, Leila Smiley and Brenda Flores, were working in the store at the time. It being a Sunday night, the store had closed at 6:00 p.m.

Rumohr was working near a checkout stand when he noticed two men inside the store. One of the men pointed a gun at Rumohr's forehead. At the gunman's direction, Rumohr got on the ground. Flores testified she was at a register when she noticed an African-American man wearing a blue hoodie sweatshirt, latex gloves, and a bandana across part of his face. The man yelled, "Get on the floor. Get on the floor." When Flores did so, she noticed a second man with a gun.

Harden noticed two armed men near the checkout stand wearing masks or bandanas on their faces and hoodie sweatshirts covering their heads. One of the men grabbed Harden's shirt and pulled her towards the checkout stand. He told Harden to get on the floor. Rumohr, Lewis, and Duffy, as well as the two female employees, were already on the ground. One of the gunmen pulled out zip ties to tie everyone up. The man's mask fell down and Flores could see his face; he was an African-American with a "clean cut" mustache. That man asked Smiley where the safe was, but when Duffy's inventory tool began to buzz, the gunmen fled because they thought it was an alarm.

b. *Big Lots [counts 28–30].*

On November 2, 2007, at 4:25 a.m., Juan Mendoza, Manuel Vega, Jeremy Woods, and Kenny Davidson were working at a Big Lots store on 5321 Vineland Avenue in North Hollywood. The store was set to open at 9:00 a.m. When Mendoza walked into the warehouse, he saw two African-American men wearing masks. Davidson was on the ground with his hands tied with zip ties. Woods later walked into the warehouse and was ordered to the ground and also tied up. One of the masked men pointed a gun at Mendoza and asked if he was the manager. When Mendoza said yes, the man pointed the gun directly at Mendoza's head and said, "Take me to the office."

Inside the office, one of the men pointed a gun at Mendoza's head and ordered him to open the safe. When Vega walked into the office, one of the men knocked him down to the ground. Once the safe was open, Mendoza was knocked to the ground as well. The gunmen put about $1,700 into a pillow case and fled.

c. *99 Cents Store (Los Angeles) [count 27].*

On November 9, 2007, at 4:45 a.m., Felipe Cabezas was working at a 99 Cents Store at 6121 Wilshire Boulevard in Los Angeles. The store was not scheduled to open until 10:00 a.m., but other employees were expected to arrive at 5:00 a.m. When someone knocked, Cabezas opened the door, thinking it was some of his employees, but two men came in with guns. Cabezas thought they "sounded African-American." One of them pointed a gun at Cabezas's head and said, "Open up the safe, cuz." As Cabezas began walking to the front of the store where the safe was located, one of the men kept a gun pointed at his head. After Cabezas opened the safe, he was tied up. The men took about $2,000 and ran from the store.

d. *Whole Foods Market [counts 25–26].*

On November 13, 2007, at about 4:45 a.m., Sanford Jenkins arrived at the Whole Foods Market located at 19340 Rinaldi Street in Northridge to deliver bread. A dumpster at the loading dock was blocking his way and there was an African-American man near the dumpster who "did not belong there." After parking his truck, Jenkins was walking toward the store to get help moving the dumpster when he was stopped by two African-American masked gunmen, one of whom was the person who had been near the dumpster. The men pointed their guns at Jenkins and very forcefully dragged him into the store.

Jorge Lopez was in his office at the Whole Foods warehouse when he heard some noise. Two African-American men suddenly appeared, one of whom grabbed Lopez and held a gun to his neck.

The other man pointed his gun at Jenkins. The gunmen had their faces covered and Lopez could only see their eyes. They both wore gloves.

Jenkins was assaulted: "They knocked [Jenkins] to the floor, facedown. They had his hands tied. They were holding him down and . . . had the gun against him and said that if he moved they would kill him." The other gunman had Lopez take him to the safe. When Lopez said he did not have the keys to the safe, the gunman hit him in the head with the gun. Lopez suffered a cut on his head that required approximately four to six staples to close. One gunman then brought Lopez back to the warehouse, forced him to the ground, and tied his hands behind his back. The gunmen fled.

e. *99 Cents Store (Northridge) [counts 23–24].*

At 5:45 a.m. on November 13, 2007, Erick Morino was working at the 99 Cents Store at 8966 Reseda Boulevard in Northridge. Moises Suarez, a truck driver, was also in the store. Morino was in the warehouse when two African-American men appeared with bandanas covering their faces and heads. Both men were armed and wore gloves. One of them grabbed Morino, pointed a gun at his temple and then behind his ear, and demanded to be taken to the safe. The other gunman grabbed Suarez and tied his hands behind his back. Morino took the gunman to the safe, but said he did not have the combination. The gunman threw Morino to the floor and hit him in the head, accusing him of being the manager and knowing how to open the safe. The gunmen fled.

f. *Trader Joe's (Encino) [count 22].*

On December 13, 2007, at 11:50 p.m., Manuel Arvizu was walking to his car after finishing his shift at the Trader Joe's market at 17640 Burbank Boulevard in Encino. The store had closed at 9:00 p.m. Arvizu left through the front doors and

walked around to the back where he had parked. He saw two men in the parking lot. One of them was wearing a beanie and a handkerchief covering the lower part of his face; the other was wearing a beanie or hood with the same type of handkerchief over his face. Both men had guns.

The men had Arvizu get on the ground, tied his hands behind his back, and asked how many employees were inside the store and if there was a manager. They put Arvizu in the back seat of his car and said that if he moved he would be shot. However, Arvizu escaped and ran toward the front of the store. His manager and a coworker were inside a truck. They untied him and the three drove around the block while calling the police. As they passed the store, Arvizu noticed "a Dodge Magnum with rims" driving slowly out of the alley near the back of the store.

g. *Smart & Final [count 21].*

About 1:00 a.m. on December 14, 2007, Rafael Sandoval was working at a closed Smart & Final grocery store as part of the night crew. Sandoval left the store to retrieve a box cutter from his car, and while returning he noticed someone wearing a ski mask behind a trash can. Sandoval ran back into the store and shut the door. The person followed him and tried to enter, but Sandoval held the door shut and eventually the man ran away. A video recording from the store's surveillance cameras showed two suspects running toward the back alley shortly after the attempted break-in.

h. *Trader Joe's (Los Angeles) [counts 14–20].*

On December 23, 2007, at 10:40 p.m., Laura F., Victor Tyler, Tim Wilkinson, Jose Henriquez, Raoule Reveles, and Monique Valencia were working at a Trader Joe's store at 10850 National Boulevard in Los Angeles. The store had closed at 9:00 p.m., and the employees were cleaning up and restocking.

Valencia went to the alley to throw away the trash. As she returned to the store, two African-American men followed her. Henriquez was in the warehouse when he noticed two armed African-American men inside the store. One stood behind Henriquez and touched the back of his head with a gun, while the second one pointed a gun an inch from Henriquez's forehead. The second gunman searched Valencia and Henriquez, taking Valencia's cell phone. The second gunman was wearing a loose "hoodie-type" mask with eyeholes, and Henriquez saw some scars through the eyeholes. The second gunman had Henriquez and Valencia lie down on the floor, pulled out a rope, and tied both Henriquez's and Valencia's hands behind their backs. The gunman was wearing gloves.

From there, the gunmen moved on to neutralize the other employees. Reveles was tackled from behind by one of the gunmen who put a gun to his head and told him not to look up. Reveles did as he was told because he did not want to die. The gunman tied Reveles's hands with a thin rope and took him to the back of the store. The gunman left and later returned with Tyler, whose hands were also tied.

Wilkinson was working in the grocery aisle when he saw two African-American men wearing ski masks and black hoodies. One of them put a gun to Wilkinson's back and said, "Don't move." He was taken to the back of the store where he saw Reveles on the ground with the other gunman pointing a gun at his head. Wilkinson said he could open the safe. Reveles was taken to the walk-in refrigerator; other employees were already inside.

The first gunman left the warehouse and walked into the store, toward the front office area that the employees called "the pit." Laura was working there, handling paperwork and money. She noticed an African-American man walking from the freezer

section toward the cash registers. He wore a mask with "eyeholes" and a black hoodie, and carried a handgun. The man pointed a gun at Laura and ordered her to open the safe. When she said she could not because she just was a manager-in-training, he moved her out of the pit and took her to a different part of the store where he sexually assaulted her.

Meanwhile, Wilkinson used a six-digit code to open the safe, which had a 15-minute time delay. When Laura was subsequently taken to the walk-in refrigerators, Reveles, Tyler, Henriquez, and Valencia were already inside with their hands tied behind their backs. Henriquez noticed that the gunman who brought Laura to the refrigerator was the one who had been standing behind him in the warehouse; he had two small scars underneath his right eyelid and had a lazy left eye. The other gunman had some scars above his left eye.

Once the 15-minute time delay had passed, the gunmen took about $6,500 from the safe and left the store after using zip ties to bind Wilkinson's hands behind his back.

i. *Washington Square Market [counts 11–13].*

At about 5:50 a.m. on December 31, 2007, Pamela Roberson—general manager for the Washington Square Market at 4040 Washington Boulevard—was opening the store. She and her employee, Hector Gamma, opened the front door together. While Gamma opened the gate, Roberson went back inside to turn off the alarm.

Two African-American men wearing ski masks approached Gamma. One of the men pointed a gun at Gamma's back while the other went into the store after Roberson. When the gunman pushed him, Gamma threw his coffee at him; a struggle ensued during which the gunman beat Gamma and then dragged him into the store at gunpoint.

After Roberson turned off the alarm, she saw an African-American man come into the store with a gun. He pointed it at her head and said, "Take me to the safe." The gunman wore a ski mask and a hoodie sweatshirt. Roberson took him to the safe inside the office and opened it. The gunman took about $37,800 from the safe and put the money in a pillow case. The gunman tied Roberson's hands and feet with blue ropes while she was on the ground face down. The gunman left the office.

Subsequently, Roberson picked out Glenn Boldware's picture from a six-pack photographic lineup and identified him as the gunman who had taken her to the office safe.

j. *Boldware's death and Harris's subsequent robberies.*

Boldware was shot and killed by Los Angeles police officers on January 4, 2008. Thereafter, Harris carried out a few robberies by himself (and one with an unidentified accomplice), before being joined by defendant Nelson for the last robbery attempt on July 11, 2008, a crime which immediately led to their arrest.

k. *Goodyear Tire [count 10].*

On May 10, 2008, Jose Sanchez was working as the cashier at an International House of Pancakes ("IHOP") restaurant on the 6500 block of Laurel Canyon in North Hollywood, next to a Goodyear Tire store. Shortly before 7:00 a.m., Sanchez saw an African-American man wearing a beanie and a hoodie sweatshirt at the glass front door of IHOP trying to get in. The man was carrying a backpack. Sanchez waved his hands indicating that the restaurant was not open yet. The man walked away.

At about 7:00 a.m., Gregory Chesney and Carlos Lemus were working at the Goodyear Tire store. Lemus was in the office when he saw through the windows an African-American man outside walking toward the front glass door, and putting on black

sunglasses and a hood over his head. Because the man was also carrying a plastic bag which appeared to contain aluminum cans, Lemus thought he was homeless. The man pulled out a gun from his waistband and walked into the store. Lemus ran out the door and went to the IHOP restaurant next door to call the police.

Chesney was inside the store when an African-American man wearing a hoodie over his head and a mask partially covering his face came into the store carrying a blue bag. The man pointed a gun at Chesney and told him to get on the floor. The man then grabbed Chesney's collar, lifted him off the ground and asked, "Where's the money?" When Chesney said the money was in the safe, the gunman ordered Chesney to open it. Chesney had difficulty opening the safe and the gunman said, "If you don't open it now, I'm going to fuckin' kill you." Chesney eventually opened the safe. The gunman took about $620, put the money in his bag, and left the store.

On June 4, 2008, Sanchez, Chesney, and Lemus were separately shown a six-pack photographic lineup in which Harris's photograph was in position three. Sanchez identified Harris's picture and wrote, "Not 100 percent, but No. 3 looks similar to the guy that tried to come in the door from IHOP." Chesney identified Harris and the person in position two as having the same complexion as the robber, and identified Harris as having the same build as the robber. Lemus also identified Harris and the person in position two as most resembling the robber.

l. *The Lodge Steakhouse [counts 37–38].*

Linda Bemiller was the manager of The Lodge Steakhouse, 14 North La Cienega Boulevard in Beverly Hills. At about 1:00 a.m. on May 14, 2008, she had closed the restaurant and was working in the office with a friend, Benjamin Lee. An African-American man wearing a ski mask came into the office. Because

the gunman's ski mask was "loose" or "stretched out so it was falling down," he pulled it up a few times. Bemiller could see his whole face. The man pointed a gun at Bemiller's face and told her to give him all the money. Both Bemiller and Lee initially thought someone was playing a prank, but then the man chambered a round in the gun. He ordered Bemiller to open the safe and she did.

The gunman told her to put everything into his backpack. The gunman took between $3,000 and $5,000 and left. Meanwhile, Lee remained on the floor, where the gunman had ordered him to stay. Lee testified that the whole time "I was on my stomach and I had my face propped up on my hands. I wanted to get as much detail as possible—memorizing, staring at him—while he was busy trying to get the money out of the safe." Lee testified he could see the gunman's eyes and mouth through the opening of his ill-fitting ski mask. Both Bemiller and Lee noticed that the gunman had a "lazy eye" that did not face forward. The day after the robbery, Lee identified Harris as the robber in a photo array.

m. *Best Buy Market [counts 5–9].*

At 5:15 a.m. on May 29, 2008, Rafael Ramirez, Jose Amaya, Norberto Gonzalez, and Arturo Baeza were working at the Best Buy Market at 2250 Pico Boulevard in Los Angeles. The store was not yet open for business, but the back door was open. A man wearing a handkerchief that covered the bottom portion of his face pointed a gun at Baeza's face and asked for money. Baeza said the money was in a safe, but that he did not have the keys. They saw Ramirez cleaning the aisles, and the gunman took both Baeza and Ramirez to the storeroom. Gonzalez and Amaya were already there, sitting on the floor with a second gunman pointing a gun at them. Baeza turned around and tried to disarm the first gunman, but he hit Baeza in the head with the

gun. Baeza suffered a cut that required three staples to close. Gonzalez described both gunmen as African-American men wearing masks and gloves. A few hours later, Baeza was shown a six-pack photographic lineup and identified Harris in position three as the man who had hit him in the head with a gun.

n. *Lawry's Prime Rib restaurant [counts 1, 2 & 4].*

At 5:50 a.m. on July 11, 2008, Walter Eckstein was working as the executive chef at Lawry's Prime Rib restaurant in Beverly Hills. The restaurant was closed for business at the time. Eckstein saw a man come through the rear delivery door wearing dark clothing and holding a gun. Suddenly a second man, whose head was covered, grabbed Eckstein from behind and put a gun to his forehead. Eckstein was ordered to open the safe, but he said he could not. The men had Eckstein lie on the floor and one of them tried to tie his hands, but failed. The two men left the restaurant suddenly.

Within a few minutes, Detective Robert Kraus of the Los Angeles Police Department came in and spoke to Eckstein. An hour later, Detective Donald Walthers drove Eckstein to the area of San Vincente and Fairfax for a field lineup. Eckstein could not identify the robbers because he never saw their faces, but he said that Harris's and Nelson's clothing and size appeared to be similar to that of the robbers.

2. *The police investigation.*

In November 2007, Detective Tracey Benjamin was assigned to investigate a string of commercial robberies that someone had nicknamed the "The Morning Masked Bandits" case. On November 13, 2007, Benjamin went to the Northridge 99 Cents Store where an attempted robbery had occurred earlier that morning. She discovered that surveillance camera footage from a nearby business showed a Dodge Magnum driving down

an alley next to the 99 Cents Store about 50 minutes before the crime. About a month later, Benjamin learned that a victim had observed a similar Dodge Magnum at the time of a robbery at the Trader Joe's in Encino.

In January 2008, police located and searched Glenn Boldware's Dodge Magnum. Inside the car, they found a stocking cap, a pair of white cotton gloves, seven pieces of rope, a pair of white latex gloves, a pair of blue latex gloves, a Department of Motor Vehicles (DMV) registration card, and two AT&T phone receipts for the number (323) 314-1562. The DMV registration for the Dodge and the phone receipts were in Boldware's name. In the trunk, the police found a nylon stocking tied in a knot, a knit cap, a pair of black cloth gloves, two pieces of red and yellow checkered rope, two pieces of black rope, several pieces of white rope, and several blue latex gloves.

Benjamin testified the items recovered from Boldware's Dodge perked her interest: "The ropes, they were very unique in nature. One of the ropes appeared to be identical to the one that was used to tie up Manuel Arvizu at the Trader Joe's [in Encino]. There was blue rope with some yellow design, and that rope appeared to be identical to the one used in the Washington Square Market. There were several pieces of white rope that were cut, several pieces, and those ropes appeared to be identical to the ones used at the . . . other Trader Joe's where the sexual assault occurred. [¶] There was [*sic*] also beanies and gloves, and there was a beanie, in particular, that had holes cut out." Benjamin then obtained a warrant to search Boldware's house at 4846 Saint Elmos Drive. There she found several lengths of blue rope that had "yellow and red threading or weave through it." She also found a black cloth rope inside Boldware's house.

Based on the AT&T cell phone receipts, Benjamin obtained the call data for phone number (323) 314-1562, which was

Boldware's cell phone. Analysis of that data revealed the phone number of a possible second suspect: defendant Harris. The police located Harris's residence at 133 North Eastwood in Inglewood, and confirmed that his vehicle was a burgundy Ford F-150 truck. Beginning on May 30, 2008, a large team of detectives began a 27-day-long surveillance of Harris to see if he was involved in these crimes. On 12 of those 27 days, Harris spent time with defendant Nelson visiting more than 60 different businesses. Rather than going shopping, it appeared the defendants were searching for places to rob.

For instance, on June 1, 2008, the surveillance team observed Harris, at about 9:15 p.m., pick up Nelson in his truck and drive to a CVS pharmacy at Workman and Broadway Streets in Los Angeles, where they remained parked for a few minutes before driving off. They drove to a Jon's market in North Hollywood and remained there for five minutes. They next drove to a CVS pharmacy at Willis and Ventura Boulevard, and then to a Best Buy in Van Nuys. The defendants remained at the Best Buy for about three minutes. Around 11:40 p.m., they drove back to the Jon's market in North Hollywood, parked, and walked around. They left after 15 minutes.

Defendants next drove to a Gelson's market in Valley Village where Harris stopped and walked around the parking lot pretending to pick up trash. He also crawled around some bushes while watching the market's front entrance. The store was closed for business at that time, but its lights were on and there were people working inside. Harris eventually returned to his truck and drove off. The defendants drove to a Vallarta market in North Hollywood, to a Ralphs market on Laurel Canyon and Roscoe, and then to a 99 Cents Store in North Hollywood, where they sat in the parking lot for almost an hour. At about 3:00 a.m., defendants drove to a Smart & Final store on

Laurel Canyon and Kittridge in North Hollywood, parked for about 12 minutes, and then drove to a small market on Daily and Main, then back to the CVS pharmacy on Workman and Broadway. At 4:45 a.m., defendants drove to a Smart & Final store in East Los Angeles. They then drove to a Vallarta market on Whittier and Lorena, a Top Value market on Ferris and Whittier, Steven's Steakhouse on Eastern and Stevens, a Pep Boys store on Artesia and Passage, and finally—at 6:15 a.m.—to a Stater Brother's market on Palm and Artesia.

There was similar detailed testimony regarding other excursions undertaken by the defendants and observed by the surveillance team.

3. *The arrest at Lawry's Restaurant.*

Starting at about midnight on July 11, 2008, the surveillance team followed the defendants to various stores: a Kmart, a Vallarta market, a Gelson's market, and a Marshalls store.

At about 5:30 a.m., the defendants drove to the Lawry's restaurant in Beverly Hills. The surveillance team saw a man, who appeared to be a restaurant worker, come out of the restaurant, walk to a car, and then go back inside. Shortly thereafter, the defendants were seen going through the same door. Nelson was wearing a navy blue hoodie and dark pants, and he was carrying a black duffel bag; Harris was wearing a black hoodie and light colored pants. Defendants came back out in less than a minute and hid behind some dumpsters. They remained hidden for a minute and then ran back into the restaurant. They came back out again after a few minutes, climbed over a wall, and disappeared. Other officers saw defendants run toward Harris's truck and saw Nelson throw a black bag into the back. The defendants drove off.

At 5:54 a.m., the police stopped Harris's truck. One of the officers saw Harris point a firearm at another officer and a gunfight ensued, during which Nelson was injured and the defendants were arrested. Harris had a handgun in his waistband. In the bed of the truck, police found a black bag with 10 zip ties and a second handgun. Inside the truck's passenger compartment police found: a bag containing a pair of gloves, three black half-masks that "cover[ ] the lower portion of the face," a black hoodie sweatshirt, black and white zip ties, and more gloves. A cardholder on the front passenger seat contained a AAA card, a DMV registration card, and a social security card—all in Nelson's name.

4. *The cell phone evidence.*

Melissa Sandoval, a Verizon Wireless employee, testified about Verizon records containing subscriber information and call histories. She had reviewed "call detail records" for the telephone number (818) 915-1138 (an account in the name of Harris)[1] and for the number (323) 314-1562 (an account in the name of Boldware). Sandoval identified a document (hereafter, the "L.A. Cell Sites" document) identifying "cell site information for cell sites within the Los Angeles County area. It provides the switch information, as well as the corresponding cell sites. It also lists addresses for those cell sites." Asked to define "cell site," Sandoval testified, "A cell site is essentially a—it's not [always] a tower, but it transmits signals to and from wireless devices, so it's what enables calls to be placed and received on a network." The cell site could be a tower or just a device "attached to a

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[1] The name on the account was Felton Bradford, but it was undisputed at trial that Bradford and Harris were the same person.

building." "Within an urban area or city, the average range in the tower is anywhere between one and three miles."[2]

Sandoval testified that using the L.A. Cell Sites document and the call detail records, the physical locations of "the cell sites . . . for a particular call" could be determined; that is, you could learn which "cell tower is being used" during a phone call. Such an analysis would show the cell site or tower used, the direction of the call (whether incoming or outgoing), the number that was dialed, the calling party's number, and the duration of the call. Sandoval agreed with the trial court that this analysis "indicates the tower that was *used* when the call was made." (Italics added.)

Ellen Fama worked as a "crime intel analyst" for the Los Angeles Police Department specializing in "phone record analysis." She testified that she uses a software program called Penlink to collate the data described by Sandoval. This allows her to learn "[w]ho's calling who, where is the phone located." The following colloquy occurred:

"A. This is a report generated from the Penlink software. It's showing the . . . time, duration, the number that was dialed, the dialed name, the general location, or the switch of the tower, and then the tower. The last column is the address of the tower.

"Q. And the address of the tower, are you able to get that . . . by looking also at the L.A. Cell Site's file?

"A. Yes. What happens is when we get the raw data, we marry the call records with the cell site list to identify the towers and be able to get the addresses."

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[2] Sandoval testified that, in rural areas, the towers "cover a wider area" because "there's less population so we need the towers to cover a greater area, so they're tuned that way. And they're not in use as much as towers in the city, so we don't need as many so they're spread farther apart."

Fama testified that by using call records she could determine "which tower was being used for each call." She is then able to put that information on a map and thereby determine "this is where the phone was."

Fama testified she analyzed the cell phone records related to Harris's cell phone number (818) 915-1138, and Glenn Boldware's cell phone numbers (323) 314-1562 and (323) 932-9624.[3] Fama gave the following testimony regarding the dates and times of specific cell phone calls between Harris and Boldware that corresponded to the dates and times of the charged crimes.

On October 7, 2007, there were several calls between Harris and Boldware from 7:35 p.m. to 8:30 p.m., and these calls utilized a cell site that was located 260 yards from the Anawalt Lumber store. There had been a total of 32 calls between Harris and Boldware on October 7.

On November 2, 2007, there were a total of 19 calls between Harris and Boldware. Between 2:08 a.m. and 3:36 a.m. there were two calls. Fama testified that during this time "two towers . . . were hit," one of which was 0.962 miles from the Big Lots store.

On November 9, 2007, at 4:12 a.m., there was one call between Harris and Boldware. This call used a cell site located 0.847 miles from the 99 Cents Store.

On November 13, 2007, there were a total of 34 calls between Harris and Boldware. Boldware called Harris twice between 4:12 a.m. and 4:15 a.m., calls that used a cell tower located 1.87 miles from the Whole Foods Market. On the same date, between 4:49 a.m. and 5:54 a.m., there were four calls

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[3] Fama described this second phone number as an "alternate number associated with the subscriber Glen[n] Boldware."

between Harris and Boldware using one tower, and then a fifth call using a different tower. These cell towers were located 0.474 miles and 2.03 miles from the Northridge 99 Cents Store.

On December 13, 2007, between 11:21 p.m. and 11:49 p.m., there were 10 calls "hitting" two different cell towers. The Encino Trader Joe's is located 1.26 miles from one of these towers and 1.96 miles from the other. During that entire day, there were 71 calls between Harris and Boldware.

On December 14, 2007, between 12:27 a.m. and 12:57 a.m., there were 12 calls using cell towers that were located 0.556 miles and 2.01 miles from the Smart & Final store. Throughout the entire day, there had been 70 calls between the two men.

On December 23, 2007, between 10:16 p.m. and 11:37 p.m., there were six calls between the two men that "hit" cell towers located 423 yards and 0.432 miles from the Trader Joe's market on National Boulevard. There were a total of 100 calls between the two men that day.

On December 31, 2007, there were a total of 54 calls between Harris and Boldware, of which six "hit" a cell site located 0.453 miles from the Washington Square Market between 5:01 a.m. and 5:48 a.m.

Fama also reviewed cell phone records for the telephone number (424) 296-0535, which belonged to Monique Valencia, the Los Angeles Trader Joe's clerk whose phone had been stolen during the robbery on December 23, 2007. On December 24, 2007, there were incoming calls at 1:07 a.m. and 9:21 a.m., and an incoming text message at 9:22 a.m. The calls used a cell phone tower located 0.305 miles from Boldware's residence.

The defendants did not present any evidence.

5. *Trial outcome.*

Both Harris and Nelson were convicted of conspiracy to commit robbery, attempted robbery, and possession of a firearm by a felon (Pen. Code,[4] §§ 182/211, 664, 211, [former] 12021). In addition, Harris was convicted of six more counts of attempted robbery, five counts of assault with a firearm, seven counts of robbery, 14 counts of false imprisonment by violence, sexual battery by restraint, and one additional count of possession of a firearm by a felon (§§ 664/211, 245, 211, 236, 243.4, [former] 12021). As to both defendants, the jury also found true personal firearm use, prior serious felony conviction, and prior prison term allegations. (§§ 12022.5, 12022.53, 667, subds. (a)–(i), 667.5). Harris was sentenced to prison for a term of 620 years to life, and Nelson was sentenced to prison for a term of 50 years to life.

CONTENTIONS

Harris and Nelson contend the trial court erred by denying their motion to suppress evidence obtained by use of a GPS tracking device affixed to Harris's vehicle.

Harris contends his convictions must be reversed because the prosecution misused certain cell phone evidence and defense counsel was ineffective for failing to rebut that evidence.

Harris and Nelson contend there was cumulative error.

Nelson contends his sentence was improperly enhanced with two prior serious felony conviction findings under section 667, subdivision (a).

DISCUSSION

1. *Motion to suppress evidence was properly denied.*

Defendants contend the trial court erred by denying their motion to suppress evidence obtained when the police secretly

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[4] All further statutory references are to the Penal Code unless otherwise specified.

affixed a GPS tracking device to Harris's truck without a search warrant. We conclude the trial court properly denied the suppression motion because the police were acting in good faith reliance on the state of the law at the time.

a. *Standard of review*.

"The Fourth Amendment provides '[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . .' (U.S. Const., 4th Amend.) This guarantee has been incorporated into the Fourteenth Amendment to the federal Constitution and is applicable to the states. [Citation.] A similar guarantee against unreasonable government searches is set forth in the state Constitution (Cal. Const., art. I, § 13) but, since voter approval of Proposition 8 in June 1982, state and federal claims relating to exclusion of evidence on grounds of unreasonable search and seizure are measured by the same standard. [Citations.] 'Our state Constitution thus forbids the courts to order the exclusion of evidence at trial as a remedy for an unreasonable search and seizure unless that remedy is required by the federal Constitution as interpreted by the United States Supreme Court.' [Citation.]" (*People v. Camacho* (2000) 23 Cal.4th 824, 829–830, fn. omitted.)

A reviewing court must uphold the trial court's factual findings if they are supported by substantial evidence. (*People v. Williams* (1988) 45 Cal.3d 1268, 1301, disapproved on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176, 1190.) "The question of whether a search was unreasonable, however, is a question of law. On that issue, we exercise 'independent judgment.' [Citations.]" (*People v. Camacho*, *supra*, 23 Cal.4th at p. 830.)

b. *Factual background*.

At the suppression hearing, Detective David Friedrich testified that between May and July, 2008, he participated in an undercover (plain clothes and unmarked cars) surveillance effort aimed at defendant Harris. Sometime after May 30, he placed a battery-powered GPS tracking device on Harris's pickup truck while it was parked on a public street. At the time Friedrich affixed the device, his understanding of the existing state of the law was that police were permitted to place such a device on a vehicle without a search warrant if the affixing was done in a public place. He had been trained that a search warrant was required only if he hardwired the device to the vehicle, e.g., by powering the GPS device from the vehicle's own battery.

Asked if the GPS device had "recording capabilities," the following colloquy occurred:

"The witness: The GPS device has a memory that we use [but] . . . none of the movements [ ] the vehicle made were saved.

"By Mr. Nelson:

"Q. Is there any reason why they weren't made or saved?

"A. We utilize the GPS in our surveillance . . . just to locate the vehicle to begin physical surveillance of the pickup [truck], and that was the only reason why we utilized the device, so we can come in in the afternoon, and if the car wasn't there, we weren't wasting our time waiting for the vehicle to show back up on [*sic*] the house. [¶] We would just dial it up and then respond to the location of the vehicle and begin a physical surveillance."

Detective Friedrich could not recall specifically who made the decision to install the GPS device on Harris's truck, but he thought it had probably been Detective Tracey Benjamin, the detective in charge of the case.

Friedrich testified the device had to be replaced "a few times." Each time, the truck was in a public place.

The trial court denied defendants' suppression motion because at the time the GPS device was used in this case, the United States Supreme Court had not yet decided *United States v. Jones* (2012) 565 U.S. 400 [132 S.Ct. 945] (*Jones*), which held that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.' " (*Id*. at p. 404, fn. omitted.) Prior to that time, controlling precedent in California allowed tracking devices to be placed on the underside of vehicles without a warrant because "installing an electronic tracking device on the undercarriage of defendant's truck did not amount to a search within the meaning of the Fourth Amendment." (*People v. Zichwic* (2001) 94 Cal.App.4th 944, 953 (*Zichwic*).) The trial court concluded that Friedrich's testimony was credible and that he had acted in reasonable good faith.

c. *Discussion*.

In 2012, the United States Supreme Court in *Jones* "held that the government's attachment of a GPS tracking device to the defendant's vehicle and use of that device to monitor the vehicle's movements on public streets was a search within the meaning of the Fourth Amendment and thus required a warrant."[5] (*People v. Mackey* (2015) 233 Cal.App.4th 32, 94 (*Mackey*).) "*Jones* changed the law in California. Prior to *Jones,* California state courts and the Ninth Circuit had held that installation of a GPS device by law enforcement authorities was not a search governed by the Fourth Amendment because a vehicle operator had no reasonable expectation of privacy in a vehicle's exterior. [Citations.]" (*Id*. at p. 95.)

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[5] *Jones* concluded a Fourth Amendment search occurred because the "[g]overnment physically occupied private property for the purpose of obtaining information." (*Jones*, *supra*, 565 U.S. at p. 404.)

"[N]ewly announced rules of constitutional criminal procedure must apply 'retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception.' [Citation.]" (*Davis v. United States* (2011) 564 U.S. 229, 243 [131 S.Ct. 2419] (*Davis*).) However, "*Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule*." (*Id.* at p. 241, italics added.)[6]

Detective Friedrich installed the GPS transmitter in 2008, before *Jones* was decided. At that time, the binding California appellate precedent was *Zichwic*, which held that placement of an electronic tracking device on the undercarriage of a vehicle, by an officer who was in a place where he or she had a right to be, did not constitute a search and, therefore, did not require a search warrant. Hence, the question becomes whether using the GPS device in this case is entitled to the objective good faith exception set forth in *United States v. Leon*, *supra*, 468 U.S. 897

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[6] "Our retroactivity jurisprudence is concerned with whether, as a categorical matter, a new rule is available on direct review as a *potential* ground for relief. Retroactive application . . . lifts what would otherwise be a categorical bar to obtaining redress for the government's violation of a newly announced constitutional rule. [Citation.] Retroactive application does not, however, determine what 'appropriate remedy' (if any) the defendant should obtain. [Citation.]. . . . As a result, the retroactive application of a new rule of substantive Fourth Amendment law *raises* the question whether a suppression remedy applies; it does not answer that question. See [*United States v.*] *Leon* [(1984)] 468 U.S. [897,] 906 [104 S.Ct. 3405] ('Whether the exclusionary sanction is appropriately imposed in a particular case . . . is "an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct" ')." (*Davis*, *supra*, 564 U.S. at pp. 243–244.)

[104 S.Ct. 3405]. (See *People v. Macabeo* (2016) 1 Cal.5th 1206, 1219–1220.)

As Harris acknowledges, this issue has already been squarely addressed by *Mackey*, where an Oakland Police officer placed a GPS tracking device on the defendant's vehicle without a warrant in 2007 (i.e., five years before *Jones* was decided). The device was battery-operated and was installed while the vehicle was parked in a public place. The device sent signals that could be tracked in real-time through the Internet. (*Mackey*, *supra*, 233 Cal.App.4th at pp. 93–94.) At the suppression hearing, the prosecutor cited *Zichwic* and argued the officer had acted in good faith reliance on case law at the time allowing him to install the device without a warrant. The trial court agreed that affixing a GPS device to the exterior of the vehicle did not violate the defendant's Fourth Amendment rights. (*Mackey*, at pp. 94–95.) On appeal, the Court of Appeal affirmed the denial of the suppression motion, finding that the "holding in *Zichwic* was [the] binding California precedent upon which the police could reasonably rely in 2007, when they installed a GPS device on [the defendant]'s vehicle." (*Id.* at p. 96.) As in *Mackey*, here it was objectively reasonable for the police in 2008 to rely on *Zichwic* as the basis for affixing the GPS device to Harris's truck without a search warrant.

Harris argues the prosecution failed to produce sufficient evidence at the suppression hearing to establish a *Leon* good faith exception because Detective Friedrich testified he was not the actual "decision-maker," i.e., he had been ordered by a superior officer to affix the device to Harris's truck. But the guiding test is objective, not subjective: "[W]e hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." (*Davis*, *supra*, 564 U.S. at p. 232; see also *People v. Willis* (2002) 28 Cal.4th 22, 33 ["the

good faith exception . . . is an objective one; [it] does not turn on the subjective good faith of individual officers"]; *United States v. Sparks* (1st Cir. 2013) 711 F.3d 58, 66, fn. 6 ["we do not believe . . . that *Davis* requires the government to show actual, as well as objectively reasonable, reliance"].)

Harris argues *Zichwic* did not constitute binding appellate authority because the defendant there "claimed a Fourth Amendment search violation based only on the installation of the tracking device. In contrast, appellant here argued the warrantless attachment of the device and the ensuing prolonged monitoring was constitutionally prohibited." But this argument is misleading because the defendant in *Zichwic* in effect conceded he would lose on the monitoring argument given the state of the law at that time: "We observe that it is a separate question whether monitoring signals from a tracking device is a search. [Citation.] The United States Supreme Court has concluded that monitoring electronic signals does not amount to a search when the only information provided is what could be obtained through visual surveillance, such as the movements of an automobile on public thoroughfares. (*United States v. Knotts* (1983) 460 U.S. 276, 281–282, 285 [103 S.Ct. 1081, 1085, 1087].) Monitoring does amount to a search when it reveals information about otherwise hidden activities inside a residence. (*United States v. Karo* (1984) 468 U.S. 705, 715 [104 S.Ct. 3296, 3303].) In our case, monitoring the tracking device simply revealed the movements of defendant's truck on city streets." (*Zichwic*, *supra*, 94 Cal.App.4th at p. 956; see *United States v. Sparks*, *supra*, 711 F.3d at p. 67 ["[A]t the time of the search in this case, *Knotts* was widely and reasonably understood to stand for the proposition that the Fourth Amendment simply was not implicated by electronic surveillance of public automotive movements, because the latter was merely a more efficient 'substitute . . . for an

activity, namely following a car on a public street, that is unequivocally *not* a search within the meaning of the amendment.' [Citations.] (Italics added.)"]; *United States v. Pineda-Moreno* (9th Cir. 2012) 688 F.3d 1087, 1090 ["T]he agents attached and used the mobile tracking devices . . . in objectively reasonable reliance on then-binding precedent. In 2007, circuit precedent held that placing an electronic tracking device on the undercarriage of a car was neither a search nor a seizure under the Fourth Amendment. [Citation.] Circuit law also held that the government does not violate the Fourth Amendment when it uses an electronic tracking device to monitor the movements of a car along public roads. [Citations.]".)

Harris also argues that section 637.7, enacted in 1998, negates any good faith exception to imposition of the exclusionary rule. But this statute says, in relevant part: "(a) No person or entity in this state shall use an electronic tracking device to determine the location or movement of a person. [¶] . . . [¶] (c) *This section shall not apply to the lawful use of an electronic tracking device by a law enforcement agency*." (Italics added.) Not only do the very terms of the statute contradict Harris's argument, but *Mackey* rejected the same argument: "Defendants further claim the exact rationale *Zichwic* relied on—that defendant did not have a reasonable expectation of privacy—had been, in their words, 'explicitly rejected as the policy of this state' by the Legislature's enactment of section 637.7. The introductory section of the enacting legislation included the statement that 'electronic tracking of a person's location without that person's knowledge violates that person's reasonable expectation of privacy.' (Stats. 1998, ch. 449, § 1.) . . . . [¶] [But the] legislative statement referred to does no more than establish a general statewide policy. It cannot define the scope of the exclusionary rule in California. That definition is contained within the

'[t]ruth-in-[e]vidence' provision of the California Constitution (art. I, § 28, subd. (f)(2) [formerly subd. (d)]), which prohibits application of the exclusionary rule to evidence gathered in violation of state law unless exclusion is compelled by the federal Constitution. [Citation.]" (*Mackey*, *supra*, 233 Cal.App.4th at p. 97, fn. omitted.)

We conclude the trial court properly denied defendants' motion to suppress evidence gathered by the GPS device in this case.

2. *The claimed errors involving the cell phone evidence were not prejudicial to Harris.*

Harris raises a number of appellate claims related to the cell phone evidence presented at trial by Sandoval (the Verizon employee) and Fama (the police cell phone data analyst). The underlying contention is that the prosecutor improperly suggested to the jury that the cell phone tower evidence showed not only how close the victimized businesses were to the cell phone *towers* "hit" or "pinged" by Harris's and Boldware's phone calls, but also how close the businesses were to the cell phones *themselves*. Harris argues that it is only the second half of this evidentiary chain that could reasonably have given rise to an inference that Harris and Boldware were in close proximity to the victimized stores when the crimes were committed. The specific appellate claims raised by Harris are these: the prosecutor committed misconduct during closing argument by asserting the jury had been presented with evidence showing the physical location of the cell phones themselves; Harris's attorney rendered ineffective assistance of counsel by not calling a defense cell phone expert to rebut this assertion; and the trial court erred by denying Harris's new trial motion raising this same ineffective assistance of counsel claim.

a. *Background*.

During closing argument, the prosecution outlined its theory that Harris and Boldware had together committed all of the crimes up until January 4 (the day Boldware was killed), i.e., the crimes at Anawalt Lumber, Big Lots, a 99 Cents Store, Whole Foods, another 99 Cents Store, Trader Joe's, Smart & Final, another Trader Joe's, and the Washington Square Market. After Boldware's death on January 4, 2008, Harris himself robbed Goodyear Tire and the Lodge Steakhouse. With an unknown accomplice, Harris tried to rob the Best Buy Market and, finally, Harris and Nelson together tried to rob the Lawry's restaurant.

In closing argument, the prosecutor sometimes spoke in terms of the cell phone evidence having demonstrated the actual locations of the phones, and sometimes just in terms of demonstrating which cell phone towers had been "hit" or "pinged" during calls. For instance, the prosecutor said, "[W]e have both of those cell sites that were hit less than a mile from the Big Lots," and, "Lo and behold . . . [Harris's] phone is less than a mile away from the 99 Cents Store." The prosecutor said both that "[Harris] is hitting a cell tower less than two miles away from the Whole Foods in Northridge," and, "So let's look at where [Harris's] phone was between 11:20 and [11:49]. He's hitting cell sites less than two miles away, . . ." And: "So we have Monique's phone[7] that is now pinging, is the term that is used, it's hitting a cell tower less than a third of a mile from Boldware's house. . . . [¶] So what does that mean? . . . Now, remember . . . all that information did for the police was say, 'Okay, the phone is somewhere near this tower on Pico.' They didn't know who Boldware was, so all they had was this big area of where Monique's phone was."

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7 This was the cell phone stolen during one of the Trader Joe's robberies.

In response to this argument, Harris's attorney—who neither called a defense cell phone expert to testify, nor cross-examined Fama—merely responded that a call between Harris's phone and Boldware's phone did not necessarily mean that Harris and Boldware were talking ["Now, I think we're all familiar with cell phones being passed around from one person to another"], and that cell phone billing records are very complex and hard to decipher.

The prosecutor responded by arguing: "[T]hat cell phone evidence . . . is so . . . overwhelmingly strong against [Harris] there [are] only two reasonable explanations . . . for the location of his cell phone next to each of those . . . crime scenes at the times they occur. There's only two. [¶] The first reasonable explanation is that [Harris] was the robber. The other reasonable explanation, if he was not the robber, is that he was following the robber to every location, and that is just silly. So the only reasonable explanation is truly that he was the robber."

After the jury convicted Harris, a new attorney filed a new trial motion on his behalf, alleging that Harris had been denied effective assistance because his trial counsel failed to rebut the cell phone evidence. The motion alleged that trial counsel had been "ignorant as to cell phone triangulation and other issues related to how to rebut that particular evidence," and that he failed to furnish his cell phone expert with all the cell phone data needed for the defense expert to rebut the prosecution evidence. The motion asserted that Harris had been "convicted of 25 crimes for which the strongest and sometimes only true evidence against him was claims that his cell phone was at or near the scene[,] at or near the time of the incident."

Attached to the new trial motion was a declaration from Michael O'Kelly, a cell phone expert whom the defense had

contacted.[8] O'Kelly's declaration stated the following: "In order for the government to identify, measure and/or place a cell device in a location, specific wireless data must be part of the analysis. It is expected and required that wireless data such as Beamwidth, Downward Tilt, etc. are the basic elements to begin to understand the possible RF [*sic*: presumably 'radio frequency'] signal coverage. This would be a starting point to design an RF signal survey for field testing." O'Kelly declared this data "was not in the government Discovery," that the prosecutor had told O'Kelly "that all of the wireless data that he was provided was similarly provided to the defendants," and that "[u]pon carefully reviewing the prosecution's Discovery, there was no cellular electronic, paper or data in any other form that could be analyzed to support an opinion by a cellular expert to identify and/or calculate any distance involving a connection between a cell phone and cell site in any call activity."

O'Kelly also asserted: "Applying the existing wireless data in this Discovery, it is impossible for the prosecution cell phone witnesses to calculate, identify and/or determine any location of a cell device in relationship to a single cell site (tower) and a cell device. RF signals can bypass or jump over one (1) cell site (tower) and connect onto another. This cell site (tower) jumping can occur with multiple cell sites (towers). There is no available wireless support data for the prosecution position and the position they presented is without merit." O'Kelly stated that he "was not able to offer expert advice at trial because Declarant

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[8] The defense expert's declaration accompanying Harris's new trial motion was not initially included in the clerk's transcript, but on March 1, 2016, we augmented the record on appeal to include the complete new trial motion. The expert's declaration is Exhibit A to the new trial motion, and the following page citations are to the internal numbering of that declaration.

never received the complete cellular electronic information necessary to evaluate the cell phone evidence triangulation issues in this matter. Please see attached emails wherein I requested information attached hereto as Exhibit 'B.' "[9]

At the hearing on the new trial motion, the prosecutor disputed the assertion that O'Kelly had not received all the available cell phone information, stating: "I personally emailed to [O'Kelly] the data that was relied upon in this case at the trial. I sent him the electronic files with regard to the Verizon evidence that was used." The trial court commented: "[W]e told [O'Kelly] on numerous occasions . . . that all of the records were here, and he doesn't explain why he didn't come to court and look at them."

The prosecutor's main argument, however, was that the People had never attempted to present the kind of "triangulation evidence" that would demonstrate a cell phone's physical location at the time a call is made: "If the court will recall, there was no such evidence presented in this case about a particular location that a cell phone was during the time of a call. Rather, the evidence in this case that was presented was a particular phone number, which the People then proved was connected to the defendant, made a call or was part of a call at a particular time . . . that particular call hit off of a particular cell tower, and then that cell tower was a particular distance from the crime scene location. [¶] *There was no evidence as to where the cellular telephone was at any particular time*." (Italics added.) The prosecutor added, "And so *the data that was presented was not where Mr. Harris's phone was located at a particular date and*

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[9] Attached to the new trial motion were several emails O'Kelly had sent to Harris's attorney between June 2012 and November 2012, complaining about not having received the cell phone data he required from various phone companies, including Verizon and AT&T.

time, but only which cell tower it was using and the distance of the cell tower to . . . each location of a robbery and/or attempted robbery." (Italics added.)

The trial court denied the new trial motion, finding that Harris's trial attorney had made a tactical decision not to have a cell phone expert testify. The court acknowledged the importance of the cell phone evidence, however: "The court will concede that the cellular telephone evidence was very significant in this case, and if an expert did exist, who could impeach this prosecution evidence, this witness should have been called. However, I don't believe on this record that I can make such a finding. [¶] I also agree with the prosecution that the type of cellular telephone evidence offered was pretty simplistic and basic, not very sophisticated, not your triangulation cellular telephone evidence, which is many times subject to a second expert on the other side. This was fairly simplistic cell telephone evidence and cell technology evidence, and I question whether [O'Kelly] could have actually undermined that evidence."

The trial court also went on to hold that, even if Harris had been able to show deficient performance by trial counsel in not calling a cell phone expert, he could not demonstrate any resulting prejudice given all the other evidence against him: the sheer number of calls between Boldware and Harris, when those calls were made, the evidence of Boldware's Dodge Magnum car being at two different crime scenes, the eyewitness identifications, and the common-scheme evidence. The trial court noted the evidence showed that Harris and Boldware "always committed the robberies between basically the hours of 12:00 and 6:00 a.m., that they tried to take over places where there were few workers, that they . . . told them to open the safe, they had guns, all of this M.O. evidence was very powerful." The court concluded, "There is no other evidence to explain why they're

making phone calls in the middle of the night, 18 to 36 phone calls, Harris and Boldware, except that they are involved with planning and getting ready to commit morning robberies. [¶] And then, finally, you have the most significant evidence . . . . they [i.e., Harris and Nelson] were caught redhanded in the final situation, the Lawry's."

b. *Discussion*.

Harris argues on appeal: "The prosecutor acknowledged, in argument on the new trial motion, that there was no evidence presented as to the location of appellant's phone. There was merely evidence of the distance from the cell towers to the crime scenes. The prosecutor was, indeed, correct that no such evidence was presented.[10] However, his argument [to the jury] urged such a conclusion." Harris asserts, "The prosecutor misled the jury into thinking that the location of appellant's cell phone was close to the cell tower off which his calls pinged. This argument left the jury with the incorrect inference that the prosecutor knew of scientific evidence, not presented, which supported this argument."

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10 We agree with this statement. Although, as we have noted *ante*, Fama on a few occasions spoke as though this is what the evidence showed (i.e., she testified that her data analysis allowed her to see where the phone is located and "where the phone was"), taken as a whole her testimony did not purport to prove any such thing. Her testimony and her exhibits indicated only the locations of cell towers that had been "hit" during phone calls, and the distance between those towers and the victimized businesses. Although Sandoval testified the "average range" of an urban cell phone tower or cite is "between one and three miles," there was no testimony explaining what happens when the radio wave from a cell phone pings off a tower during a cell phone call.

Given how clear it is that the evidence presented did not purport to establish a triangulation analysis (see fn. 10, *ante*), we believe that rather than deliberately mislead the jury, the prosecutor may merely have misspoken when he talked about where the cell phone was, as opposed to which cell phone tower or site the phone call had hit. In any event, we need not reach this issue because, as we now describe, the evidence tending to show that Harris and Boldware were the "Morning Masked Bandits" was so strong that it is not probable the outcome would have been any different had the prosecution (or a defense cell phone expert) made it clear to the jury that no triangulation analysis had been done.

Both prosecutorial misconduct and ineffective assistance of counsel claims require a showing of prejudice. (See *Williams v. Taylor* (2000) 529 U.S. 362, 390–391 [120 S.Ct. 1495] [" '[T]he defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.] [¶] . . . [The defendant] 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' "]; *People v. Riggs* (2008) 44 Cal.4th 248, 298 ["Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' . . . and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action ' "so infected the trial with

unfairness as to make the resulting conviction a denial of due process." ' [Citations.]]".)

In the present case, defendant's expert, O'Kelly, did not complete a triangulation analysis that would have pinpointed the physical locations of the cell phones when the relevant calls were made, and it is not clear from the record that it would have been possible to do so given the available phone company data. More importantly, it is of course unknown what conclusions such a triangulation analysis would have reached—i.e., whether it would have been exculpatory or inculpatory.

We conclude Harris cannot demonstrate the kind of resulting prejudice needed to sustain his appellate claims. As the trial court mentioned, there was a great deal of evidence connecting Harris and Boldware to the so-called Morning Masked Bandits case. There was evidence that Boldware's car had been near the location of two of the victimized businesses (a Trader Joe's and a 99 Cents Store). Boldware himself had been identified by an eyewitness during the Washington Square Market robbery. Harris was identified by witnesses following the Goodyear Tire robbery and the Lodge Steakhouse robbery. Two other victims in the Goodyear robbery made partial identifications of Harris. In addition, three witnesses had noticed that one of the perpetrators had a "lazy eye," and the jury presumably could see that Harris, too, had a so-called "lazy eye."[11] Of course, Harris was caught red-handed after the Lawry's attempted robbery.

Entirely apart from any claim that the evidence had actually pinpointed the location of Harris's and Boldware's cell

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[11] The Attorney General asserts that "Harris's left eye had a similar condition." In his responsive brief, Harris does not dispute this assertion.

phones, there was—as the trial court noted—the evidentiary weight of the sheer *number* of phone calls between Harris and Boldware on days when robberies and attempted robberies occurred. To take just four of those occasions, during December 2007, there were: 71 phone calls between them on December 13; 70 calls on December 14; 100 calls on December 23; and, 54 calls on December 31. In addition, there was the remarkable testimony regarding observations by the police surveillance team that Harris and Nelson spent almost an entire night traveling from one closed business to another, apparently searching for potential targets.

The trial court also noted the ample common-scheme evidence, which was indeed striking. There was consistent use of guns, masks, gloves, and precut ropes and zip ties to bind the employees. Such materials were found in the possession of both Boldware and Harris. Detective Benjamin testified to the unique quality of some of these items, saying that ropes found in Boldware's Dodge "appeared to be identical" to the ropes used in three of the crimes. Further, in each case the perpetrators exhibited a level of violence that was both extreme and gratuitous. Despite being armed and thus having complete control of their targets, the perpetrators nonetheless repeatedly engaged in a frightening level of violence: not merely pointing their guns at the employees, but often holding the weapon right up to their heads; pistol-whipping some victims; sexually assaulting one victim; and threatening to kill several victims.

When all this evidence is taken into account, we conclude Harris would not have been able to prove either ineffective assistance of counsel or prosecutorial misconduct with respect to the cell phone evidence because he failed to demonstrate any resulting prejudice.

3. *There was no cumulative error*.

The defendants contend the cumulative prejudicial effect of the various trial errors they have raised on appeal requires the reversal of their convictions. Because we have not found any significant prejudicial error, this claim of cumulative error is without merit. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1056 ["Defendant contends the cumulative prejudicial effect of the various errors he has raised on appeal requires reversal of the guilt and penalty judgments. We have rejected his assignments of error, with limited exceptions in which we found the error to be nonprejudicial. Considered together, any errors were nonprejudicial. Contrary to defendant's contention, his trial was not fundamentally unfair, even if we consider the cumulative impact of the few errors that occurred."].)

4. *Nelson's sentence was improperly enhanced by prior conviction allegations added after the jury was discharged.*

Nelson contends the trial court erred by sentencing him on two out of three prior serious felony conviction enhancements (§ 667, subd. (a)) because they were not "brought and tried separately." This claim is based, in turn, on Nelson's contention that the trial court erred by letting the People amend the information to add additional prior conviction allegations after the jury had already been discharged. The Attorney General properly concedes that the latter claim has merit, but then argues, inconsistently, that the former claim is incorrect. We find that Nelson's sentencing claim does have merit, and we will order that two of the five-year enhancements imposed under section 667, subdivision (a), be stricken.

The amended information on which the defendants were tried alleged that Nelson had sustained a number[12] of prior

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[12] We find the parties' counting of these priors to be confusing. Both parties assert there were three such priors

serious felony convictions under section 667, subdivision (a), which provides for "a five-year enhancement for each such prior conviction on charges brought and tried separately." (§ 667, subd. (a)(1).) According to the amended information, all of these priors arose out of the same 1992 judgment in superior court case number BA014699. After Nelson's jury was discharged, and over his objection, the trial court allowed the People to amend the information a second time to allege additional prior convictions under two other superior court cases: a 1981 judgment in case number A081445, and a 1978 judgment in case number A444411. According to the Attorney General, the reason for this second amendment was that "the prosecutor . . . failed to review [Nelson's section 969b prison packet] adequately."

As the Attorney General rightly concedes, it was improper for the trial court to allow the prosecution to amend the information to add additional prior conviction allegations *after* the jury had already been discharged. As stated by the Supreme Court in *People v. Tindall* (2000) 24 Cal.4th 767 "[s]ection 1025, subdivision (b) provides, in pertinent part: 'the question of whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty . . . .' Section 969a, however, states that prior conviction allegations may be added '[w]henever it shall be discovered that a pending indictment or information does not charge all prior felonies . . . .' We interpreted section 969a to permit the

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charged. However, next to the second degree robbery conviction, the amended information says "(3 cts.)," and next to the aggravated assault conviction the amended information says "(6 cts.)." Hence, where the parties count only three section 667, subdivision (a), allegations, it appears that nine such priors may have been charged, albeit all stemming from the same superior court case.

prosecution, on order of the court, to amend the information until sentencing so long as the court has not discharged the jury. [Citations.] Notwithstanding section 969a, defendant argues that section 1025, subdivision (b), prohibits the prosecution from amending the information to allege prior convictions after the jury that decided the guilt issue has been discharged. For reasons that follow, we agree." (*Id.* at pp. 771–772, fn. omitted; accord, *People v. Gutierrez* (2001) 93 Cal.App.4th 15, 24 ["The trial court acted in excess of jurisdiction in allowing the prosecution to file a late, amended information alleging the Nevada state robbery conviction as a strike prior and as a five-year enhancement."].)

Hence, we agree with Nelson that the additional prior serious felony conviction findings arising from the allegations added to the information after his jury was discharged must be vacated.

Nelson next contends that his sentence must be corrected because, as part of his prison term of 50 years to life, the trial court included 15 years for three section 667, subdivision (a), priors, but should have only punished him for one five-year enhancement. We agree. "[T]he requirement in section 667[, subdivision (a)] that the predicate charges must have been 'brought and tried separately' demands that the underlying proceedings must have been formally distinct, from filing to adjudication of guilt. Here, as the record plainly reveals, the charges in question were not 'brought . . . separately,' but were made in a single complaint." (*In re Harris* (1989) 49 Cal.3d 131, 136; *People v. Deay* (1987) 194 Cal.App.3d 280, 286 ["Charges brought and tried 'separately' for purposes of section 667 means simply that prior formal proceedings leading to multiple adjudications of guilt must have been totally separate"].)

The Attorney General argues Nelson is wrong because the priors stemming from case numbers A444411 and A081445 were brought and tried separately from the prior stemming from case number BA014699. But it is the Attorney General who is incorrect because, as discussed *ante*, the trial court erred by adding the prior allegations from case numbers A444411 and A081445 after the jury had already been discharged. Therefore, the two prior enhancements stemming from case numbers A444411 and A081445 must be stricken.

However, because—in addition to the 50-years-to-life term Nelson received on count 1 (for attempted robbery)—the trial court also sentenced him to a concurrent term of six years on count 3 (for possession of a firearm by a felon), it is appropriate to remand this matter so the trial court may consider restructuring Nelson's sentence. (See *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1256 ["the trial judge's original sentencing choices did not constrain him or her from imposing any sentence permitted under the applicable statutes and rules on remand, subject only to the limitation that the aggregate prison term could not be increased"]; *People v. Castaneda* (1999) 75 Cal.App.4th 611, 614 [remand for resentencing proper where original sentence contained unauthorized enhancement]; *People v. Stevens* (1988) 205 Cal.App.3d 1452, 1455–1458 [remand for resentencing proper where original sentence violated "double-the-base-term" rule].)

DISPOSITION

Harris's judgment is affirmed. Nelson's judgment is to be modified in accordance with this opinion, and the matter remanded to the trial court for resentencing.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

JOHNSON (MICHAEL), J., Concurring.

I concur in the court's disposition, but I write separately to state my belief that the prosecutor's argument regarding cell phone evidence was entirely proper.

There was evidence from a representative of Verizon Wireless that the company's cellular towers have a one-to-three mile operating range in an urban setting. There was also evidence that a cell phone used by defendant Harris made or received calls that were transmitted through cellular towers with an operating range that included some of the crime scenes. This evidence supports the inference that Harris and his cell phone were in the same vicinity as the crimes that were committed.

The inference became stronger (if not compelling) in light of other evidence: the cell phone use was around the same time that the crimes were committed, the areas of cell phone transmission were many miles from Harris's residence, and the convergence of cell phone transmission and crime scene location occurred nine times during Harris's crime spree. On top of this, there was evidence of reverse association: a cell phone stolen from one of the crime scenes made a call that was transmitted through a cellular tower located in the same operating area as the residence of Harris's partner Boldware.

I believe it was appropriate for the prosecutor to argue that this evidence pointed to Harris's involvement in the crimes. It was also understandable why the defense attorney did not object to this argument during trial.

On appeal, Harris has made arguments about cellular triangulation and other methods of determining the precise location of a cell phone transmission. This misses the point. In the context of the prosecution's case, it was not necessary to

prove the precise location where a call was made or received. The point was that calls occurred within the same one-to-three mile radius as the crime scenes, which were located many miles from the area where Harris lived and was usually present. Combined with the additional evidence presented at trial, this pointed directly to Harris's involvement in the crimes.

I therefore disagree with any suggestion that the prosecutor may have misspoken or misled the jury during argument. I believe the prosecutor's argument was entirely proper. (See *People v. Wharton* (1991) 53 Cal.3d 522, 567 [" 'It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.' "], quoting *People v. Sassounian* (1986) 182 Cal.App.3d 361, 396.)

JOHNSON (MICHAEL), J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.